UNITED STATES COURT OF INTERNATIONAL TRADE

GLOBE METALLURGICAL, INC.	)	
Plaintiffs,	)	
v.	)	Court No. 07-00022
UNITED STATES	)	
Defendant,	)	

MOTION TO DISMISS

Pursuant to Rule 12(b)(5), defendant, the United States, respectfully requests the Court to dismiss the complaint filed by Globe Metallurgical, Inc. ("Globe") for failure to state a claim upon which relief can be granted.[1] As we demonstrate below, Globe has failed to state a claim upon which relief can be granted because it is beyond doubt that no set of facts can be proven that would entitle Globe to the relief it requests in this action.

QUESTION PRESENTED

Whether Globe's complaint states a claim for which relief can be granted where, by its own admission, Commerce's revocation order comports with the statute, and Commerce is not obligated to postpone revocation pending challenges in companion cases before the Court.

STATEMENT OF FACTS

For purposes of this motion to dismiss based upon failure to state a claim, all undisputed facts alleged in the complaint are presumed to be true and all reasonable inferences are drawn in Globe's favor. See Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995). We do not

[1] If the Court denies this motion to dismiss, we respectfully request an additional 60 days from the Court's order within which to respond to the complaint.

dispute the procedural background in Globe's complaint, and provide the salient administrative proceedings for the Court's convenience.

On January 3, 2006, Commerce published a notice of initiation of a five-year ("sunset") review of the antidumping duty order on silicon metal from Brazil. Initiation of Five-Year ("Sunset") Reviews, 71 Fed. Reg. 91 (Jan. 3, 2006); Compl. ¶ 8. On the same day, the United States International Trade Commission ("ITC") published a notice of institution of a sunset review of the antidumping duty order on silicon metal from Brazil. Silicon Metal from Brazil and China: Institution of Five-Year Reviews Concerning the Antidumping Duty Orders on Silicon Metal from Brazil and China, 71 Fed. Reg. 138 (Jan. 3, 2006); Compl. ¶ 9. In April 2006, the ITC gave notice that it would conduct a full review of the antidumping duty order on silicon metal from Brazil. Silicon Metal from Brazil and China: Notice of Commission Determinations to Conduct Full Five-Year Reviews Concerning the Antidumping Duty Orders on Silicon Metal from Brazil and China, 71 Fed. Reg. 23,947 (Apr. 25, 2006); Compl. ¶ 13.

In May 2006, Commerce published its determination that revocation of the antidumping duty order on silicon metal from Brazil would likely lead to continuation or recurrence of dumping. Silicon Metal from the People's Republic of China and Brazil: Final Results of the Expedited Reviews of the Antidumping Duty Orders, 71 Fed. Reg. 26,334 (May 4, 2006).

In December 2006, the ITC published its determination that revocation of the antidumping duty order on silicon metal from Brazil would not likely lead to continuation or recurrence of material injury within a reasonably foreseeable time. Silicon Metal

from Brazil and China: Determinations, 71 Fed. Reg. 71,554 (Dec. 11, 2006); Compl. ¶ 16. 17. On December 21, 2006, as a result of the ITC's negative sunset review determination, Commerce published its revocation determination. Silicon Metal from Brazil: Revocation of Antidumping Duty Order, 71 Fed. Reg. 76635 (Dec. 26, 2006); Compl. ¶ 17.

ARGUMENT

I. Standard Of Review

A complaint should be dismissed for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Mitchell Arms, Inc. v. United States, 7 F.3d 212, 215 (Fed. Cir.1993); Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1565 (Fed. Cir.1988); Kemet Electronics Corp. v. Barshefsky, 976 F.Supp. 1012, 1027 (Ct. Int'l Trade 1997); see also Lowrey v. Tex. A&M University Sys., 117 F.3d 242, 247 (5th Cir. 1997) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the Court takes all well-pled factual allegations as true and construe them in favor of the non-moving party. See United States v. Ferro Union, Inc., 24 C.I.T. 769 (2000).

"To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint and documents incorporated in the complaint by reference." United States v. Maxi Switch, Inc., 18 F. Supp. 2d 1040, 1041 (Ct. Int'l Trade 1998) (citing Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991)); United States v. Nippon Miniature Bearing, Inc., 3 F. Supp. 2d 1448, 1450 (Ct. Int'l Trade 1998). A motion to dismiss for failure to state a claim for relief goes to the sufficiency of the pleading under Rule 8(a)(2), and the only information necessary for a decision on the motion is

to be found in the pleading itself; if outside evidence is considered, the motion is converted into one for summary judgment. See, e.g., Cedars-Sinai Medical Ctr. v. Watkins, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993).

"On a motion to dismiss for failure to state a claim, any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." Amoco Oil Co. v. United States, 234 F.3d 1374, 1376 (Fed. Cir. 2000). Nevertheless, the "plaintiff must plead specific facts, and not merely conclusory allegations." Int'l Custom Prods. v. United States, 374 F. Supp. 2d 1311, 1323 (Ct. Int'l Trade 2005) (citing United States v. Inn Foods, Inc., 264 F. Supp. 2d 1333, 1335 (Ct. Int'l Trade 2003)).

II. The Complaint Fails to State a Claim Upon Which Relief May be Granted

Globe's complaint is defective upon its face because, by its own admission, Commerce's revocation of the antidumping duty order regarding silicon metal from Brazil pursuant to 19 U.S.C. § 1675(d)(2) comported with its statutory mandate to revoke an antidumping duty order where the International Trade Commission ("ITC") has issued a negative determination.

Granting the relief sought by Globe in this action would be contrary to the statutory provisions governing revocation. Globe requests relief in form of a "determination that the legal basis for revoking the antidumping duty order on silicon metal from Brazil does not exist" and an "order that the antidumping duty order on silicon metal from Brazil be reinstated . . . ." Compl. ¶ 24. However, such relief, if granted, would directly contravene the statute. Specifically, the statute provides as follows:

> (2) Five-year reviews
>
> In the case of a review conducted under subsection (c) of this section, the administering authority shall revoke a countervailing

> duty order or an antidumping duty order or finding, or terminate a suspended investigation, unless—
>
> (A) the administering authority makes a determination that dumping or a countervailable subsidy, as the case may be, would be likely to continue or recur, and
>
> (B) the Commission makes a determination that material injury would be likely to continue or recur as described in section 1675a (a) of this title.

19 U.S.C. § 1675(d)(2) (emphasis added). Thus, pursuant to the statute, Commerce is obligated to revoke an order where, as here, the ITC has determined that material injury would not be likely to continue or recur. Indeed, Globe concedes in its complaint that Commerce "shall revoke an antidumping duty order" under these circumstances. Compl. ¶ 19. Globe's concession that the ITC issued a negative determination, Compl. ¶ 20, nullifies its prayer for declaratory relief that the Court "determine that the required legal basis for revoking the antidumping duty order on silicon metal from Brazil does not exist." Pursuant to section 1675(d)(2), the legal basis for Commerce's revocation of the order is the ITC determination that injury is not likely to continue or recur should the order be revoked.

Globe alleges that, in the ITC litigation, it seeks "review and the correction of errors in the Commission's determination, that, if corrected, Plaintiff believes will result in a finding of likely continuation or recurrence of material injury to an industry in the United States." Compl. ¶ 22. Globe's challenge of the ITC's determination, however, does not provide a valid basis for Commerce not to perform its obligation under the statute, i.e. revocation of the order. Regardless of whether Globe has challenged the ITC determination, the statute does not permit Commerce to determine whether the ITC's determination contains errors, or whether the ITC's determination should be corrected. Instead, the statute compels Commerce to revoke the order

because the ITC determined that material injury would not be likely to continue or recur if the order were revoked. The statute is clear and unambiguous in its command that Commerce must revoke the order under the facts of this case.

It is apparent from Globe's complaint that the true nature of its claim relates to events that may, or may not, eventually transpire. In particular, Globe seeks reinstatement of the antidumping duty order should it prevail in its challenge to the ITC's determination. Compl. ¶ 24. First, whether Globe will prevail in obtaining a final and conclusive judgment that results in an ITC determination that injury in likely to continue or recur is speculative. Second, and more importantly, even assuming that Globe prevails in it claim against the ITC, Globe has not been denied the relief it is seeking from the Court in the present action. Globe cannot establish, and does not allege, that Commerce would refrain from reinstating the antidumping duty order on silicon metal from Brazil upon notification from the ITC that the results of the ITC's sunset review had changed to a determination that injury was likely to continue or recur.

In such a circumstance, Commerce would be obligated, as legal matter, to reinstate the order because the revocation would no longer be in accordance with 19 U.S.C. § 1675(d)(2). In any event, in this case Globe cannot challenge actions or inactions that may, or may not, occur in the future. Globe cannot demonstrate, by any set of facts, that Commerce's revocation of the antidumping duty order on silicon metal from Brazil pursuant to 19 U.S.C. § 1675(d)(2), which is the only action Globe has challenged in this case, is contrary to law.

Commerce is not obligated to postpone revocation pending challenges in companion cases before the Court. Commerce generally bases its revocation upon the information available to it at the time, and need not wait until appeals of related cases are final and complete. See

Carpenter Tech. Corp. v. United States, slip op. 07-18, ___ F. Supp. 2d ____, 2007 WL 273846 at 4 (Ct. Int'l Trade Jan. 31, 2007) (discussing Commerce's revocation pursuant to section 1675(d)(1)); see also Co-Steel Raritan, Inc. v. ITC, 357 F.3d 1294, 1316 (Fed. Cir. 2004) (explaining that judicial review of determination by agency is based upon information available to at the time of agency's decision). Accordingly, there is no basis for contesting Commerce's issuance of a revocation notice to implement the ITC's negative determination in accordance with its statutory obligations.

Accordingly, Globe has failed to state a claim upon which relief may be granted.

CONCLUSION

For these reasons, we respectfully request that this action be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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March 19, 2007

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CERTIFICATE OF SERVICE

I hereby declare that on the 19th day of March, 2007, I caused to be served copies of "MOTION TO DISMISS," in the following manner addressed as follows:

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UNITED STATES COURT OF INTERNATIONAL TRADE

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UNITED STATES,	)	
Defendant.	)	

ORDER

Upon consideration of defendant's motion to dismiss, plaintiff's response thereto, and all other pertinent papers, it is hereby

ORDERED that the motion is granted.

_____
JUDGE

Dated: _____, 2007

New York, New York